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In The
Supreme Court of the United States

BEN CHAVEZ,

Petitioner,

v.

OLIVERIO MARTINEZ,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with nearly 300,000 members that has been engaged in defense of the Bill of Rights for more than 80 years. The ACLU of Southern California is its largest affiliate. Many of the ACLU's efforts have focused on enforcing those portions of the Bill of Rights having to do with the administration of criminal justice, including participation as *amicus curiae* in *Miranda v. Arizona*, 384 U.S. 436 (1966). The ACLU continues to believe, as we believed in 1966, that if the Fifth Amendment privilege is to remain an effective guarantor of our accusatorial system of criminal justice, the right to remain silent during custodial interrogation must be protected, both by ensuring that warnings are provided to persons subjected to custodial interrogation, and by requiring police to respect an individual's right to cut off questioning. Further, the ACLU believes that deliberate disregard of *Miranda* severely undermines this Court's endeavor to establish concrete constitutional guidelines for law enforcement agencies to follow during the interrogation process, and tarnishes the integrity of our judicial process.

The California Attorneys for Criminal Justice is a non-profit corporation founded in 1972. CACJ has 2400 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its by-laws, is

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[1] All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

to defend the rights of individuals guaranteed by the United States Constitution. The members of CACJ are gravely concerned about law enforcement efforts to circumvent the Fifth Amendment and the ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). CACJ members accordingly authorized the organization to bring a civil rights action to prohibit questioning over an invocation of the right to counsel. *See Cal. Att'ys for Crim. Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999). CACJ also sponsored legislation in California to prohibit law enforcement agencies from training officers to disregard *Miranda*. *See* S.B. 1211, 2001-01 Reg. Sess. (Cal. 2001). The legislation passed the California Senate but failed to pass the Assembly; it was opposed by the California District Attorneys Association.

You guys wake up out there cuz we got something a little controversial this week. . . . This has to do with questioning "outside Miranda*." Should you do it? When should you do it? What if you do? What if you don't?. . . .*

What if you've got a guy that you've only got one shot at? This is it, it's now or never because you're gonna lose him – he's gonna bail out or a lawyer's on the way down there. . . . And you Mirandize him and he invokes. What you can do – legally do – in that instance is go "outside Miranda*" and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial. . . .*

[Y]ou may want to go "outside Miranda*" and get information to help you clear cases. . . . Or, his statements might reveal the existence and the location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used or whatever else it was. . . . So you go "outside* Miranda*" and if he talks "outside* Miranda*" – if the only thing that was shutting him up was the chance of it being used against him in court – and then you go "outside* Miranda*" and take a statement and then he tells you where the stuff is, we can go and get all that evidence.*

And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial – that he's cooked up with some defense lawyer – that wasn't true. So if you get a statement "outside Miranda*" and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that, because the U.S. Supreme Court in* Harris v. New York *and the California Supreme Court in* People v. May *have told us that we can use statements "outside* Miranda*" to impeach or to rebut. . . . I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, the fact that they weren't Mirandized will mean we cannot use them in the case-in-chief but it does not mean we can't use them to impeach or rebut. So you see you got all those legitimate purposes that could be served by statements taken "outside* Miranda*". . . .*

There's no law that says you can't question people "outside Miranda*". . . . So you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're not doing anything improper. . . .*

Now, some people worry, "Gee, if I question a guy 'outside Miranda*,' won't I get prosecuted myself?" "Won't I get sued in civil court for violating his*

civil rights?" Well just ask yourself, have you ever seen hundreds – hundreds and hundreds – of published cases where a court found a Miranda *violation. Did any of those police officers get sued? Zero. . . .*

So, whether you do it is up to you. I don't tell you what to do. Can you do it? Sure you can.[2]

STATEMENT OF FACTS

The facts that gave rise to this litigation were set forth as follows by the court of appeals:

> On November 28, 1997, police officers Maria Pena and Andrew Salinas were investigating narcotics activity near a vacant lot in a residential area of Oxnard, California. While questioning one individual, they heard a bicycle approaching on the darkened path that traversed the lot. Officer Salinas ordered the rider, Oliverio Martinez, to stop, dismount, spread his legs, and place his hands behind his head. Martinez complied.
>
> During a protective pat-down frisk, Officer Salinas discovered a knife in Mr. Martinez's waistband. Officer Salinas alerted his partner and pulled Martinez's hand from behind his head to apply handcuffs. Officer Salinas claims that

[2] Excerpt of transcript of Devallis Rutledge, counsel of record for *Amicus Curiae* National Association of Police Organizations, Inc., in Videotape: *Questioning: "Outside* Miranda*"* (Greg Gulen Productions 1990), *quoted in* Charles D. Weisselberg, *Saving Miranda,* 84 Cornell L. Rev. 109, 189-92 (1998).

> Martinez pulled away from him. Martinez alleges that he offered no resistance. Either way, Officer Salinas tackled Martinez and a struggle ensued.
>
> Both officers testified that during the struggle Martinez did not attempt to hit or kick them; Officer Salinas struck the only blow. The officers maintain that Martinez drew Officer Salinas's gun and pointed it at them. Martinez alleges that Officer Salinas began to draw his gun and that Martinez grabbed Officer Salinas's hand to prevent him from doing so.
>
> All parties agree that Officer Salinas cried out, "He's got my gun." Officer Pena drew her weapon and fired several times. One bullet struck Martinez in the face, damaging his optic nerve and rendering him blind. Another bullet fractured a vertebra, paralyzing his legs. Three more bullets tore through his leg around the knee joint. The officers then handcuffed Martinez.
>
> The patrol supervisor, Sergeant Ben Chavez, arrived on the scene minutes later along with paramedics. While Sergeant Chavez discussed the incident with Officer Salinas, the paramedics removed the handcuffs so they could stabilize Martinez's neck and back and loaded him into the ambulance. Sergeant Chavez rode to the emergency room in the ambulance with Martinez to obtain his version of what had happened.
>
> As emergency room personnel treated Martinez, Sergeant Chavez began a taped interview. Chavez did not preface his questions by reciting *Miranda* warnings. The interview lasted 45 minutes. The medical staff asked Chavez to leave the trauma room several times, but the tape shows

that he returned and resumed questioning. Chavez turned off the tape recorder each time medical personnel removed him from the room. The transcript of the recorded conversation totals about ten minutes and provides an incontrovertible account of the interview.

Sergeant Chavez pressed Martinez with persistent, directed questions regarding the events leading up to the shooting. Most of Martinez's answers were non-responsive. He complained that he was in pain, was choking, could not move his legs, and was dying. He drifted in and out of consciousness. By the district court's tally, "[d]uring the questioning at the hospital, [Martinez] repeatedly begged for treatment; he told [Sergeant Chavez] he believed he was dying eight times; complained that he was in extreme pain on fourteen separate occasions; and twice said he did not want to talk any more." Chavez stopped only when medical personnel moved Martinez out of the emergency room to perform a C.A.T. scan.

Martinez v. City of Oxnard, 270 F.3d 853, 854-55 (9th Cir. 2001); App. 2a-4a.

SUMMARY OF ARGUMENT

Time and again, for nearly four decades now, this Court has made clear that once a criminal suspect has invoked his right to silence or to an attorney, police interrogation must cease. *See, e.g., Davis v. United States*, 512 U.S. 452, 458 (1994) ("If a suspect requests counsel at any time during the interview, he is not subject to further questioning."); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77

(1991) ("Once a suspect asserts the right [to counsel], . . . the current interrogation [must] cease."); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) ("[W]hen counsel is requested, interrogation must cease."); *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) ("[A]fter a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation.'") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980)); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("[O]nce the accused 'states that he wants an attorney, the interrogation must cease.'") (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)); *Edwards*, 451 U.S. at 485 (once the right to counsel is "exercised by the accused, 'the interrogation must cease.'") (quoting *Miranda*, 384 U.S. at 474); *Rhode Island v. Innis*, 446 U.S. 291, 293 (1980) ("In *Miranda* [], the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.") (citation deleted); *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) ("[A]n accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.") (footnote omitted). The strength of this rule "lies in the clarity of its command and the certainty of its application." *Minnick*, 498 U.S. at 151.

Petitioner's and *amici*'s arguments may be reduced to the proposition that this Court's repeated admonitions to law enforcement, far from being clear commands, are in fact no more than suggestions, and that law enforcement compliance is thus optional, rather than mandated. Put otherwise, petitioner contends that the court of appeals

has erred by taking this Court's words seriously, while law enforcement officers have acted properly, even commendably, by willfully ignoring them.

Miranda was intended in part as a rule of deterrence: if law enforcement officers failed to abide by the rules governing custodial interrogation so unequivocally laid down by this Court, any statements obtained from the accused would be excluded from trial. *See, e.g., Michigan v. Tucker,* 417 U.S. 433, 447 (1974) ("By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused."). Instead, some law enforcement officers have systematically exploited the exceptions to *Miranda*'s exclusionary rule and, because they have largely not been faced with civil liability, have had a clear *incentive* to violate *Miranda*'s dictates – an incentive that will necessarily be approved and fortified if this Court "signal[s] police departments that they are free to disregard *Miranda* if they are willing to pay the price of exclusion" from the case in chief. Steven D. Clymer, *Are the Police Free to Disregard* Miranda*?,* 112 Yale L.J. ___ (forthcoming December 2002). "[T]hat message likely will lead to increased, and perhaps widespread, police noncompliance with the *Miranda* rules." *Id.*

The question this Court must now confront, then, is how to address flagrant and willful violations of *Miranda*'s dictates by law enforcement agencies that systematically and institutionally disregard this Court's admonitions. Such conduct "offend[s] the community's sense of fair play and decency," *Rochin v. California,* 342 U.S. 165, 173 (1952), and debases the well settled principle that "the police must obey the law while enforcing the law. . . . "

Spano v. New York, 350 U.S. 315, 320-21 (1959). At least until this case, with the exception of narrowly defined and clearly specified exigencies, the right to remain silent has been treated as sacrosanct, perhaps the single admonition from this Court that is most clearly identified by the public as synonymous with respect for the rule of law and the workings of our criminal justice system. If this Court curtails the availability of civil remedies for blatant disregard of that right, then what were intended as "concrete constitutional guidelines for law enforcement agencies," *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (quoting *Miranda*, 384 U.S. at 442), will increasingly be treated as mere suggestions – suggestions, moreover, that officers who disagree with *Miranda*'s tenets will deem irrational to follow.

The court of appeals' decisions holding that officers who willfully violate *Miranda*'s dictates may face suit under section 1983 find strong support in this Court's *Miranda* jurisprudence, and are consistent with a long line of cases holding that the Fifth Amendment may be violated outside of a trial setting. But even if this Court were to reject the Fifth Amendment analysis of the decision below, it should make clear that deliberate violations of *Miranda*'s requirements fall afoul of the Due Process Clause, and that an officer need not physically or psychologically torture a suspect in order to face liability under section 1983 for violation of the Fourteenth Amendment.

ARGUMENT

I. The Fifth Amendment's Self-Incrimination Clause Prohibits Police Officers From Compelling Statements During Custodial Interrogation

A. This Court Has Long Made Clear That the Fifth Amendment May Be Violated Outside of a Trial Setting

As the statement of facts makes clear, Sergeant Chavez disregarded *Miranda*'s dictates when he neglected to provide warnings to Martinez, and again when he persisted in questioning Martinez following express invocations of Martinez's right to remain silent. Petitioner does not deny that he intentionally questioned Martinez "outside *Miranda*." Instead, petitioner contends that *Miranda* does not in fact confer a right to remain silent during custodial interrogation, and that this Court's contextual statement in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) – that the "privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants . . . and [that] a constitutional violation occurs only at trial," *id.* at 264 – accurately sums up the Court's Fifth Amendment jurisprudence and dictates the outcome of this case. Putting aside the question whether the court of appeals properly characterized the above statement as "dicta," it is beyond dispute that this Court has, on numerous occasions, found violations of the Fifth Amendment outside of a trial setting. To hold, as petitioner suggests, that a violation of the Fifth Amendment can occur *only* at trial

would be to overturn decades-old precedents and to alter longstanding prosecutorial practices.[3]

Indeed, this Court has only recently reaffirmed that the Fifth Amendment may be violated in a case that never reaches trial, and thus that the privilege is more than a constitutionalized rule of evidentiary admissibility. In *United States v. Hubbell*, 530 U.S. 27 (2000), the Court affirmed the dismissal of an indictment on the ground that the prosecution had used the suspect's immunized act of producing documents to obtain the indictment and to prepare the case for trial. *See id.* at 41. The Court explained that the words "in any criminal case" in the text of the Self-Incrimination Clause "might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *Id.* at 37.

Hubbell, as the Court itself acknowledged, is only the most recent of many cases holding that the Fifth Amendment is more than a trial exclusionary rule. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court upheld the federal immunity statute, 18 U.S.C. §§ 6002-03, finding the statute's protections to be "coextensive with the scope of the privilege." *Id.* at 453. The Court approved the

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[3] A more thorough discussion of the incompatibility of this Court's statement in *Verdugo-Urquidez* with the Court's core Fifth Amendment jurisprudence can be found in *Brief of the National Police Accountability Project and the National Black Police Association as Amici Curiae.*

statute because a grant of immunity removes the "danger of incrimination," *id.* at 459; a person with immunity may be compelled to be a witness, but not a witness against himself. Critically, *Kastigar* does not stand for the proposition that the Fifth Amendment is violated only if compelled testimony is introduced at trial. Were that the case, then the immunity statute as written would have been *broader* than the Fifth Amendment, not coextensive with it; moreover, the Fifth Amendment would be fully protected by leaving it to defendants to object to the introduction of compelled evidence, and relying upon trial judges to exclude that evidence. That is not, however, the law. A witness can be compelled to testify over a valid claim of self-incrimination only if a prosecutor first obtains an order of immunity. As this Court has explained, "[w]e do not think that . . . a predictive judgment [that evidence will be excluded] is enough." *Pillsbury Co. v. Conroy*, 459 U.S. 248, 261 (1983).

This understanding of *Kastigar* and the Fifth Amendment is wholly in keeping with the so-called "penalty cases," such as *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), and *Lefkowitz v. Turley*, 414 U.S. 70 (1973). Those cases make clear this Court's insistence that when the government compels testimony by threatening to inflict sanctions and does not guarantee immunity, "that testimony is *obtained* in violation of the Fifth Amendment and cannot be used against the defendant." *Cunningham*, 431 U.S. at 805 (emphasis added); *see also Turley*, 414 U.S. at 83 (disqualification from public contracting for asserting the privilege, without a guarantee of immunity, violates the Fifth Amendment). Neither Cunningham nor Turley was ever subjected to a criminal prosecution.

There, as here, the Fifth Amendment was violated without the filing of any criminal charges.

B. *Miranda* and its Progeny Firmly Established That the Fifth Amendment Prohibits Compulsion During Custodial Interrogation

This Court's decision in *Miranda* is thus consistent with the penalty and immunity cases in affirming the principle that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda*, 384 U.S. at 467. That the Court plainly meant its holding in *Miranda* to extend beyond the question of evidentiary admissibility cannot seriously be disputed; it proclaimed in no uncertain terms that once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease,*" and that if the suspect "states that he wants an attorney, the interrogation *must cease until an attorney is present.*" *Id.* at 473-74 (emphases added). The Court also noted with approval the government's concession "that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." *Id.* at 463 (citation omitted); *see also Moran v. Burbine*, 475 U.S. 412, 420 (1986) ("To combat this inherent compulsion [of custodial interrogation], and thereby protect the Fifth Amendment privilege against self-incrimination, *Miranda imposed on the police an obligation to follow certain procedures in their dealings with the accused.*") (emphasis added).

Subsequent cases have emphatically reinforced that message without qualification; indeed, in *Rhode Island v. Innis*, this Court expressly characterized *Miranda*'s central holding in the following terms: "[O]nce a defendant in custody asks to speak with a lawyer, *all interrogation must cease* until a lawyer is present." *Innis*, 446 U.S. at 293 (emphasis added). In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court discussed extensively *Miranda*'s requirement that law enforcement officers must recognize a suspect's "right to cut off questioning." *Id.* at 103 (*quoting Miranda*, 384 U.S. at 474). The Court elaborated: "Through the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting." *Id.* at. 103-04. It is plain that there could exist no *right* to cut off questioning if the Fifth Amendment protected criminal suspects solely against the admission of their self-incriminating statements in the case in chief.

Perhaps this Court's clearest statement regarding the reach of the Fifth Amendment's out-of-court protections appears in *Michigan v. Tucker*, in which the Court explained that the question whether police conduct violates the Fifth Amendment and the question whether compelled testimony should be excluded at trial must be treated as separate and distinct inquiries: "We will therefore *first* consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated *only* the prophylactic rules developed to protect that right. We will *then* consider whether the evidence derived from this

interrogation must be excluded." *Tucker*, 417 U.S. at 439 (emphases added). The two-part inquiry employed in *Tucker* simply cannot be squared with petitioner's contention that the right against self-incrimination may be infringed only at trial. And most recently, in *Dickerson*, this Court reaffirmed that *Miranda* had "laid down 'concrete constitutional guidelines for law enforcement agencies *and* courts to follow,'" again stating that *Miranda* imposes constitutional restraints on both police conduct and evidentiary admissibility. *Dickerson*, 530 U.S. at 435 (quoting *Miranda*, 384 U.S. at 442) (emphasis added); *see also Fare*, 442 U.S. at 718 ("[W]hatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, *and* of informing courts under what circumstances statements obtained during such interrogation are not admissible.") (emphasis added).

C. *Miranda*'s Stated Goal of Deterring Compulsion During Custodial Interrogation Will be Eviscerated if This Court Approves the Practice of "Outside *Miranda*" Questioning

A generation of Americans has grown up since 1966 confident that if brought to the police station for questioning, we have the right to remain silent, that the police will warn us of that right, and – above all – that they will respect its exercise. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. Crim. L. & Criminology 621, 671-72 (1996). So ingrained is this teaching that *Miranda* is

synonymous in the public mind with the "right to remain silent"; we know that to invoke the former is to assert the latter without the necessity of saying so. If petitioner's theory of the Fifth Amendment is correct, the public's confidence has been misplaced for all these decades and is about to be shattered. If, indeed, *Miranda* guarantees no such right to silence – but only a right against the judicial admission of incriminating testimony – then law enforcement officers will be permitted to convert *Miranda* from a shield against coercion of a citizen's will into a powerful sword, available at an officer's will or whim, to induce confessions for a variety of purposes. For it is precisely the public's familiarity with *Miranda* that heightens the unconstitutional duress inherent in so-called "outside *Miranda*" questioning; when a suspect knows that a vital right is being denied to him, he is more likely to fear that he has no recourse but to comply with police demands.

Employing petitioner's theory, law enforcement officers throughout the country – most prominently in California – already have been trained to disregard the exercise of rights guaranteed by *Miranda* and to continue to interrogate suspects who have invoked their right to silence or to counsel. *Miranda*'s acknowledged goal of deterring police misconduct during interrogation, already considerably weakened, will be all but eviscerated if this Court embraces petitioner's theory and forecloses civil remedies for deliberate violations of *Miranda*.

More than any other circuit, the court of appeals below has been confronted with repeated, systematic, and institutionalized violations of *Miranda*'s dictates by police departments that have expressly instructed their officers on the benefits of questioning "outside *Miranda*." In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc),

the court considered the tactics of a Tucson, Arizona police and sheriff's department task force that had been formed to apprehend a notorious rapist. The task force had devised a strategy for interrogating eventual suspects: the "core of their plan was to ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney in connection therewith, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed." *Id.* at 1224. As one task force member testified, "*You know, whether he asked for an attorney or for his mommy or whatever he asked for, if he asked to remain silent, I wasn't going to stop. We decided it was going to be very clear-cut, forget his* Miranda *Rights, the hell with it.*" *Id.* at 1226 (emphasis in original). Seven years later, in *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), the court was again presented with "a policy of the defendant police to defy the requirements of *Miranda v. Arizona* [ ]. The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects 'outside *Miranda*' despite the suspects' invocation of their right to remain silent and their requests for an attorney." *Butts*, 195 F.3d at 1041 (citation deleted). In both cases, the court held that officers who deliberately violated *Miranda*'s dictates could be found civilly liable for their misconduct. Citing *Miranda*'s requirement that "all custodial interrogations be preceded by a specified advisement of rights," Judge Trott explained:

> The objective of this advisement is to ensure an accused is both aware of his substantive Constitutional right to silence, as well as his continuous opportunity to exercise that right. It is no accident that the first words out of a police

> officer's mouth during a *Miranda* advisement must be: You have "a right to remain silent." This warning is required as a *procedural* safeguard, but more importantly it expresses a *substantive* Constitutional right – the right to remain silent rather than answer incriminating questions posed by the police. It is wrong, therefore, to relegate this part of the advisement to the status of "only a prophylactic device": It is a prophylactic device, but it expresses a substantive right.

Cooper, 963 F.2d at 1239-40 (emphasis in original) (citation omitted).

The court explained that the actions of the task force members in deliberately conspiring to subvert *Miranda*'s protections were "laden with police misconduct . . . 'identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed.'" *Id.* (quoting *Tucker*, 417 U.S. at 444). In *Butts*, the court of appeals made clear that "[o]fficers who *intentionally* violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions." *Butts*, 193 F.3d at 1050 (emphasis added).[4] Far from a novel or otherwise unconventional reading of this Court's decisions in *Miranda* and subsequent cases, *Cooper* and *Butts* reflect a fierce fealty to the Court's teachings, an insistence that disagreement with the Court not be permitted to become disrespect by turning its rulings into instruments undermining their very foundation.

[4] This Court denied *certiorari* in *Butts* on the same day that it decided *Dickerson v. United States*.

Prior to the court of appeals' holding in *Butts*, the practice of deliberate questioning "outside *Miranda*" was in fact widespread in California.[5] Training materials that instructed officers on the benefits of such questioning were circulated to law enforcement officers throughout the state (*see Weisselberg, supra* note 2, at 134-36), and federal and state courts had taken note of, and expressed frustration with, the practice. For example, in *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), the court of appeals overturned a murder conviction because law enforcement officials in Sacramento, California had "set out in a deliberate course of action to violate *Miranda*," employing "slippery and illegal tactics . . . deliberately designed to undermine [the suspect's] ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation." *Henry*, 197 F.3d at 1027, 1030.

[5] While the problem has been particularly acute in California, a legal bulletin published by the Federal Bureau of Investigation reports that questioning "outside *Miranda*" has been a common practice in many jurisdictions: "numerous law enforcement agencies have encouraged and provided training in this practice. . . . " Thomas D. Petrowski, Miranda *Revisited:* Dickerson v. United States, FBI Law Enforcement Bulletin: August 2001, Volume 70, No. 8, at 29 (available at http://www.fbi.gov/publications/leb/2001/aug01leb.htm). Notably, the bulletin instructs that the practice of questioning "outside *Miranda*" "has been impacted significantly by the *Dickerson* decision and now invites § 1983 lawsuits." *Id. See also* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 275-76 (1996) (noting one empirical study demonstrating that police continued to question suspects despite the suspects' invocation of their right to silence or to consult with an attorney in nearly one out of every five cases in which suspects invoked these rights).

The California Supreme Court, too, has been confronted with convictions obtained by "outside *Miranda*" questioning. In *People v. Peevy*, 953 P.2d 1212 (Cal. 1998), a San Bernardino, California detective had testified that, following the defendant's express invocation of his right to counsel, the detective "kept talking with him for impeachment purposes." *Id.* at 1215. Although the court rejected the defendant's claim that the use of non-Mirandized statements for impeachment purposes, approved by this Court in *Harris v. New York*, 401 U.S. 222 (1971), should not be permitted when the *Miranda* violation was intentional, it also unanimously rejected the view that *Miranda* and its progeny "impose no affirmative duties upon police officers, but merely establish rules of evidence." *Id.* at 1224. The court explained:

> [T]he high court has imposed an affirmative duty upon interrogating officers to cease questioning once a suspect invokes the right to counsel, and this rule regarding police conduct serves to protect the accused in determining whether to waive his or her constitutional rights. Nothing in the language of *Harris* or *Oregon v. Hass*, 420 U.S. 714 [1975], for example, suggests that the court now considers the *Miranda* or *Edwards* rules as constituting mere advice regarding preferred police conduct. Rather, the court in *Harris* referred to the *illegality* of the police conduct in that case.

Peevy, 953 P.2d at 1224 (emphasis in original). The court declined to consider "whether statements taken pursuant to . . . a *systematic* policy of police misconduct would be admissible for the purpose of impeachment," because the question had not been presented to the lower courts. *Id.* at 1226 (emphasis added).

Strong admonitory language has proved an insufficient deterrent to deliberate "outside *Miranda*" questioning by law enforcement; indeed, the California Supreme Court's disapproval of such conduct had little effect on police training.[6] Only the "additional incentive of the threat of civil rights liability" has succeeded in altering the training provided to California law enforcement officers: following the court of appeals' decision in *Butts*, the principal training sources for California law enforcement officers now advise officers that they should no longer violate *Miranda* intentionally. Weisselberg, *supra* note 6, at 1135-54. So long as there remain permissible uses for statements obtained in violation of *Miranda*, civil liability will be the lone bulwark against deliberate subversion of *Miranda*'s principles.

II. The Due Process Clause of the Fourteenth Amendment Proscribes Deliberate Non-Compliance With Constitutional Rules Governing Custodial Interrogation

Every federal court to consider the question – including this one – has agreed that egregious interrogation tactics may give rise to civil liability under section 1983 for violation of the Fourteenth Amendment's Due Process

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[6] A bulletin prepared by the Orange County, California District Attorney's office following *Peevy* described the state high court's characterization of "outside *Miranda*" questioning as illegal as "unfortunate dictum" that would "be open to serious dispute if [it] should ever form the basis of a ruling." The bulletin continued: "Meanwhile, like they say down home, 'If you've caught the fish, don't fret about losing the bait.'" Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1143-44 (2001).

Clause, without regard to the later admission of resulting statements in a criminal case. In *Dickerson*, this Court took note of those decisions, acknowledging that "there are more remedies available for abusive police conduct than there were at the time *Miranda* was decided" – namely, "a suspect may bring a federal cause of action under the Due Process Clause for police misconduct during custodial interrogation. . . . " *Dickerson*, 530 U.S. at 442 (citing *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989)). Indeed, even prior to its decision in *Miranda*, this Court had found a violation of due process on the basis of a coerced confession, notwithstanding that the victims of the coercive practices had never been charged with a crime. *See Williams v. United States*, 341 U.S. 97, 102 (1951) ("Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees.");[7] *cf. Monroe v. Pape*, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) (recognizing possibility that psychological coercion leading to confession could entitle suspect to damages under section 1983).

The courts of appeals have described the showing necessary to state a due process claim for misconduct during interrogations in varying terms, but have uniformly held that civil remedies may be available for such

[7] *Williams* involved the criminal counterpart to section 1983; this Court affirmed the conviction of the offending officer even though, as the lower court observed, the "record [did] not show that either victim was ever brought to trial. . . . " *Williams v. United States*, 179 F.2d 656, 659 (5th Cir. 1950).

misconduct.[8] In challenging the decision of the court of appeals below that respondent suffered a deprivation of due process, petitioner and *amici* do not contend that misconduct during interrogations can never constitute an actionable due process violation; rather, the parties' sole dispute involves the appropriate due process standard to be applied, as well as the appropriate application of that standard. *Amicus* Criminal Justice Legal Foundation, for example, proposes a due process standard that would

[8] *See, e.g., Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 348 (2d Cir. 1998) ("A *Miranda* violation that amounts to actual coercion based on outrageous government misconduct is a deprivation of a constitutional right that can be the basis for a § 1983 suit, even when a confession is not used against the declarant in any fashion. . . . The challenged conduct must be the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States.") (citations omitted); *Giuffre v. Bissell*, 31 F.3d 1241, 1258 (3d Cir. 1994) (in case involving police officers who allegedly coerced a suspect to forfeit property, "the conduct of the individual officials alleged by [plaintiff] is sufficiently conscience-shocking as to state a legally cognizable claim for a violation of substantive due process under the Fourteenth Amendment"); *Gray v. Spillman*, 925 F.2d 90, 94 (4th Cir. 1991) (physical injury is not an essential element of section 1983 action alleging misconduct during interrogation); *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972) ("There is no [requirement] . . . that physical violence need be present to produce the coercion necessary to constitute an involuntary confession cognizable under § 1983. . . . In fact, Justice Harlan in his concurrence in *Monroe v. Pape*, [365 U.S. 167 (1961),] recognized the possibility that psychological coercion leading to a confession could constitute damages under § 1983, by using it as an example of an action under § 1983 which would ordinarily not fulfill the requirements for a common law tort.") (*citing Monroe*, 365 U.S. at 196 n.5 (Harlan, J., concurring)); *Rex v. Teeples*, 753 F.2d 840, 843 (10th Cir. 1985) ("Extracting an involuntary confession by coercion is a due process violation. This is so notwithstanding the coercion is psychological rather than physical. Consequently, extracting an involuntary confession is actionable under section 1983.") (citations omitted).

encompass police misconduct only at the most brutal extremes: "Interrogators should be held liable under 42 U.S.C. § 1983 for violence, the deprivation of food, water, sleep, or other life necessities or threats to commit such wrongs against the suspect." *Brief of the Criminal Justice Legal Foundation in Support of Petitioner as Amicus Curiae* at 27. That standard is too narrow: as this Court has long made clear, "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

The Due Process Clause proscribes conduct by law enforcement officials that "offend[s] the community's sense of fair play and decency." *Rochin v. California*, 342 U.S. 165, 173 (1952). The clause "was intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (*quoting Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (other citations omitted). In *Lewis*, the Court explained that the "cognizable level of executive abuse of power" under the Due Process Clause is "that which shocks the conscience." *Lewis*, 523 U.S. at 846. The Court has alternatively defined the due process protection as "prevent[ing] the government from engaging in conduct that . . . interferes with rights 'implicit in the concept of ordered liberty. . . .'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (*quoting Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)).

The question this case presents, therefore, is how courts should properly determine whether police misconduct during interrogation has satisfied the due process threshold. "Rules of due process are not . . . subject to mechanical application in unfamiliar territory." *Lewis*, 523 U.S. at 850. Thus, as this Court explained in *Lewis*, while

only flagrant and intentional police misconduct can be said to shock the conscience in the context of high-speed police chases, evidence of "deliberate indifference" is sufficient to state a substantive due process claim for deprivation of medical care to a jail or prison inmate. *Id.* at 851. "[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other. . . . [I]n the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory." *Id.* In contrast, a "deliberate indifference" standard is entirely inappropriate when "deliberation" itself is not possible. *Id.* Accordingly, "high-speed chases with no intent to harm suspects physically *or to worsen their legal plight*" do not give rise to liability under the Due Process Clause. *Id.* at 854 (emphasis added).

This Court's emphasis in *Lewis* on the "different circumstances" that confront government officials in the exercise of their duties points the way towards an appropriate understanding of when non-violent police conduct during interrogation should be held to violate due process: police should be liable for deliberate violations of *Miranda*'s dictates.[9] Thus, in holding that the behavior of

[9] By stating that deliberate violations of the rights protected by *Miranda* shock the conscience, *amici* by no means disclaim the relevance of this Court's traditional due process "voluntariness" cases in evaluating liability under section 1983. While the Due Process Clause prohibits the use of involuntary statements at trial, nothing in the cases applying the traditional voluntariness test constrains its application to criminal cases. Indeed, the voluntariness test has long focused upon police conduct, and prior cases suggest that the due process violation may occur at the time the involuntary statement is obtained.

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the officers in *Cooper* was beyond the pale of permissible conduct under the Due Process Clause and indisputably shocked the conscience, the court of appeals correctly emphasized the premeditated plan to "worsen [the] legal plight" (*Lewis*, 523 U.S. at 854) of any suspected rapist detained for questioning. The court explained:

> The primary aggravating circumstance is the Task Force's purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense – as [one officer] said, "to help keep him off the stand." By forcing [the suspect] to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. This tactic corrupts the doctrine established in *Harris* [*v. New York*, 401 U.S. 222 (1971)].

Cooper, 963 F.2d at 1249. Similarly, the evidence in *Butts* that police officers were regularly subverting *Miranda*

In *Colorado v. Connelly*, 479 U.S. 157, 164 (1986), this Court ruled that police conduct causally related to a confession is a necessary prerequisite to finding a statement involuntary. The Court explained that absent wrongful police conduct, suppressing a statement would not "substantially deter future violations of the Constitution." *Id.* at 166 (citing *United States v. Leon*, 468 U.S. 897, 906-913 (1984)). The citation to *Leon* makes sense only if a due process violation, like a Fourth Amendment violation, is complete when the statement is obtained. Otherwise, the violation could be prevented by the simple expedient of excluding the coerced evidence at trial. This point is made even more clearly in *Miller v. Fenton*, 474 U.S. 104 (1985). There, this Court held that "the ultimate issue" in voluntariness cases is "whether the State *has obtained* the confession in a manner that comports with due process." *Id.* at 110 (emphasis added).

pursuant to an official policy set forth in training programs and materials rendered the case sufficiently egregious to satisfy the due process standard. As in the prison custodial context, where "forethought ... is not only feasible but obligatory," *Lewis*, 523 U.S. at 851, deliberate violations of the rights of criminal suspects must be measured according to a more stringent standard. The tactics advocated by "outside *Miranda*" training materials, which evince utter disregard for the teachings of this Court and contempt for the rule of law, truly shock the conscience.

To be sure, elaborate conspiracies such as those brought to light in *Cooper* and *Butts* are not a necessary prerequisite for due process liability in the interrogation context. Certainly this Court was correct in observing that, for example, the forcible extraction of evidence from a victim's stomach did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically," but plainly "shock[ed] the conscience," notwithstanding the police's urgent need to obtain evidence. *Rochin*, 342 U.S. at 172. Similarly, the conduct of the police in *Mincey v. Arizona*, 437 U.S. 385 (1978), had that case arisen in the civil liability context, would undoubtedly have been sufficient to state a claim under the due process clause; there, police officers strenuously interrogated a hospitalized man who was in "unbearable" pain, was depressed almost to the point of coma, and was encumbered by tubes, needles, and breathing apparatus. *Id.* at 398-99.

The police conduct alleged in this case, eerily reminiscent of that in *Mincey*, is shocking in its flagrant violation of this Court's clearly prescribed constitutional rules for custodial interrogation. Sergeant Chavez persisted in questioning Martinez despite Martinez's repeated

invocations of his right to remain silent and his obvious and agonizing pain. This is not a case of mere failure to give *Miranda* warnings, but of intentional disregard of an express invocation of the "right to cut off questioning." *Mosley*, 423 U.S. at 103. Sergeant Chavez ignored Martinez's pleas to be left alone. If that in itself were not sufficiently shocking, by repeatedly questioning a man in a hospital bed who believed he was dying, Sergeant Chavez inflicted emotional anguish and might well have risked interfering with Martinez's medical treatment.

If Sergeant Chavez interrogated Martinez in an attempt to obtain incriminating statements, then, according to petitioner's theory, Martinez was stripped of any possible remedy for this violation when the authorities declined to prosecute him. Ironically, had Sergeant Chavez believed all along that Martinez was simply an innocent bystander, and had he truly been interested only in obtaining information about possible police misconduct, then he would have had even *less* incentive to avoid coercive questioning. In petitioner's view, there is no remedy for innocent targets who are questioned "outside *Miranda*," or who are coerced to give information, unless the police resort to physical or psychological torture. Even assuming that *Miranda*'s exclusionary rule proved a sufficient deterrent to violations of the Fifth Amendment during the interrogation of criminal suspects, no such deterrent exists when the target of police questioning is believed to be innocent.[10] Surely it cannot be that the law proscribes

[10] The court of appeals in *Cooper* took note of the anomaly that would result if the law were to provide to the guilty civil redress that was unavailable to the innocent. The en banc court quoted Judge Noonan's dissent from the original panel decision: "The position of the court is that if unlawful police interrogation overcomes the will of a guilty suspect who

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coercion of statements for use at trial, but not coercion of statements for any other purpose. In particular, if this Court agrees with petitioner's theory and holds that the Fifth Amendment affords no protection against improper interrogation tactics, it must ensure that such tactics are adequately deterred by the prospect of civil liability under the Due Process Clause.

This Court need not be concerned that the prospect of civil liability will interfere with proper law enforcement functions. An officer who ignores *Miranda* and elicits information in order to protect public safety will have committed no wrong. *See New York v. Quarles*, 467 U.S. 649 (1984). An officer who has made a reasonable mistake concerning whether a suspect has, for example, waived his *Miranda* rights or reinitiated questioning, will be able to claim qualified immunity. And an officer who wishes to interrogate a non-suspect – for example, a material witness who has been detained for questioning – in order to obtain any type of information, may compel testimony so long as immunity is offered in an appropriate judicial setting – a setting other than the back room of a police station, the confines of a jail, or a hospital intensive care unit. Only when an officer deliberately disregards clear constitutional rules will relief under section 1983 lie.

then confesses, the suspect has been denied [his Constitutional rights] and has a civil rights action against his interrogators; but if the suspect is innocent rather than guilty and so has nothing to confess, the same kind of interrogation is no violation . . . and the innocent man has no redress for violation of his . . . rights. Our law has many subtleties and turnings, but such a counter-intuitive result cannot be, and is not, the law." *Cooper*, 963 F.3d at 1237 (citation omitted).

CONCLUSION

This Court only recently reaffirmed *Miranda*'s constitutional vitality, declaring that the Court's landmark decision could "not be in effect overruled by an Act of Congress. . . . " *Dickerson*, 530 U.S. at 432. If petitioner is correct, then every police officer in every interrogation room in this country is possessed of the authority that this Court expressly denied to Congress: the power to decide when *Miranda*'s dictates are to be observed, and when they are to be ignored. The Court must not sanction such blatant disregard for the rule of law.

This Court should affirm the decision of the court of appeals.

Respectfully submitted,

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